In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 476.

JOHN ELMER WOODARDS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

John Elmer Woodards, the petitioner herein, was indicted on July 23, 1963, for Murder in the First Degree, under Ohio Revised Code Section 2901.01.

The petitioner was duly arraigned and entered a plea of not guilty and not guilty by reason of insanity. (R. 1117.)

Trial by jury commenced on January 20, 1964 (R. 6) and ended on January 31, 1964, wherein the jury returned a verdict of guilty, without recommending mercy (R. 1156). Petitioner was sentenced to be electrocuted on May 15, 1964, by the Warden of the Ohio State Penitentiary (R. 1159), in accordance with Ohio Revised Code Section 2901.01, wherein the death penalty is mandatory when the jury trying the accused does not recommend mercy.

The record reveals that Mrs. Julia Impiccini, a neighbor who assisted Mrs. Margaret Van Arsdale, deceased, in her household duties, discovered her body on the morning of July 13, 1963, wrapped in a blanket. (R. 29.)

Dr. Robert Thomas, Deputy Coroner, a pathologist, performed the autopsy on the same date (R. 136) which revealed that there were lacerations of the chin, of the upper lip, areas of bruising and laceration behind the left ear, fracture of the left clavicle, bleeding from the area of the genitalia, and an area of abrasion and bleeding on the decedent's back. (R. 135.)

As to cause of death, there were several items, any one of which in itself could have been the cause of death; the most important was a crushing of the chest, rupture of the spleen, multiple hemorrhages and fractures throughout the body, hemorrhage into the lungs resulting from perforation by fractured rib end, fractures of all ribs on both sides (R. 137), hemorrhage into each chest cavity and the pleura (R. 138) and extensive hemorrhage and bleeding into the retroperitoneal tissues, spleen torn into two separate parts, genitalia extensively damaged, lacerations which extended from the vagina posteriorly to the mucosa of the anus up both sides of the wall of the vagina from the entrance of the vagina to the cervix, fracture of the distal portion of the right fourth finger, and fracture of the collar bone. (R. 140.)

The Lorain County Sheriff was notified of the discovery of the body of Mrs. Van Arsdale, age 85 years (R. 43), and a deputy sheriff arrived at the scene before 11:00 a.m. (R. 274.) Shortly thereafter other members of the Sheriff's Department, the Lorain County Prosecutor and an Assistant Prosecutor, and the Deputy County Coroner arrived at the scene and the investigation commenced.

Deputy Sheriff Michael Ondreyco talked to Mrs. Impiccini, Mrs. Miller, Mrs. Geiger, Deputy Gehrke and Deputy Zieba (R. 379) and instructed a Deputy to pick up the petitioner, after discovering that the petitioner had

been a tenant in an upstairs apartment in the house where the body was discovered, who had left owing back rent after having done considerable damage, and avoiding a warrant of arrest of the petitioner for assault and battery and questioning of petitioner in connection with several burglaries. (R. 434-435.)

At approximately 2:00 p.m. on July 13, 1963, the petitioner was in custody and inquired of for two to three hours by Mr. Paul J. Mikus, the County Prosecutor, and a few minutes by the deputies. (R. 437.) The petitioner was not questioned on Sunday, July 14, 1963. Further investigation on July 14, 1963, at the premises revealed that a left palm print was discovered by a technician of the Cleveland Police Department (R. 441) and petitioner consented to giving a print, which was identical to the palm print found on the bedstead in the Van Arsdale home (R. 528), and again proved identical. (R. 530.)

On Monday, July 15, 1963, Mr. Ondreyco continued the inquiry from 1:15 to 1:55 p.m. and at 2:10 p.m., Assistant County Prosecutor John B. Otero continued to question the petitioner and recalled Mr. Clemento, the Court Reporter. (R. 384.) Petitioner admitted by stating, "I don't know why I did such a thing." (R. 288.)

Petitioner was apprised of his Federal and State constitutional rights by a deputy sheriff and assistant county prosecuting attorney as shown on R. 287 and R. 288.

Petitioner consented to re-enact the crime (R. 398) and Deputy Sheriff Lois Carson made a record of questions and answers.

Mr. Ondreyco introduced Mr. Clemento, the Court Reporter, stating that he had already advised the subject that he did not have to make any statement. (R. 385.)

Lois Carson also testified (R. 965) on lines 9 to 14, "Mr. Ondreyco asked all questions with the exception of

the statement on whether he understood that all statements would be used against him—or could be used against him, which statement was made by Mr. Otero."

In the petitioner's writ of Certiorari, on pages 8 and 9, it is stated that a Deputy placed him under arrest in connection with a fictitious service station robbery and cites R. 588, which is not supported by any testimony on said page.

The petitioner made an admission on July 15, 1963, after 2:00 p.m. and therefore could not have been charged and arraigned before noon on that date as stated in petitioner's brief. (p. 11.) The inquiry at the County Jail was completed after 3:30 p.m. and the petitioner agreed to re-enact the scene of the crime, which is some fifteen (15) miles from the County Jail. He was returned to the City of Elyria, Ohio, and about 6:15 p.m., the same date, he was charged and arraigned before the Elyria Municipal Court. Less than four hours had passed from the time of the discovery of his commission of the crime and arraignment.

Petitioner was represented by counsel, who waived a preliminary hearing and was bound over to the next session of the Lorain County Grand Jury.

At the trial, two eminent expert psychiatrists testified that petitioner knew the difference between right and wrong after examining the military records of the petitioner and examinations at the Lima State Hospital, which conclusions appear on R. 719 as follows:

> "Patient is not mentally defective nor psychotic nor a psychopath. He is legally sane, which means that he understands the charges against him, that he understands right from wrong, and that he is able to cooperate with his defense lawyers toward his defense."

Dr. Maurice D. Friedman, eminent psychiatrist who was called by petitioner, further testified (R. 723) that he considered and did not disagree with the psychiatric examination made by Captain Robert A. Pithian, M.D., U. S. Army, which reads as follows:

> "This soldier is not psychotic or neurotic and has no psychiatric condition which warrants disposition through medical channels."
>
> "He was and is medically responsible to distinguish right from wrong and should be able to adhere to the right and refrain from the wrong."

Dr. Gill, another eminent psychiatrist, agreed with Dr. Friedman that Woodards was a constitutional psychopath and further testified (R. 910) that a constitutional psychopath has the capacity to control himself, he just doesn't use it.

Petitioner appealed to the Ninth Judicial District of Ohio, which affirmed the conviction, to which decision, the petitioner appealed to the Ohio Supreme Court.

The Ohio Supreme Court also affirmed the conviction and this respondent requests a denial of the petition in this Court seeking relief for a writ of certiorari.

REASONS FOR DENIAL OF THE WRIT.

I.

Petitioner was duly charged, tried and convicted of First Degree Murder under Ohio Revised Code Section 2901.01, and the Ohio Constitution makes Murder in the First Degree a capital offense under Sections 9 and 10 of Article I.

Trial was had according to the following salient sections of the Ohio Revised Code:

2945.10 Order of Proceedings.
2945.11 Charge to the jury as to law and fact.
2945.16 View of the premises.
2945.17 Trial by jury.
2945.171 Verdict in writing.
2945.18 Venire for jury in capital cases.
2945.19 Special venire in capital cases.
2945.21 Peremptory challenges in capital cases.
2945.34 Admonition if jurors separate during trial.
2945.35. Paper the jury may take.
2945.37 Inquiry into insanity of defendant.
2945.38 Proceedings on finding or verdict.
2945.39 Plea of insanity as a defense.
2945.40 Expert witnesses in insanity cases.

Respondent contends that all the above sections were properly applied during the trial, and therefore, there was not a violation of the 8th and 14th Amendments to the United States Constitution.

The reasons cited by petitioner for granting a writ of certiorari at best can be summed up as a dissertation against capital punishment.

The principal need for capital punishment is that it deters others from killing human beings, thus saving innocent lives.

A survey conducted in 1965 by a commission in New York State to revise its penal code, revealed that not a single case of the wrong man being executed after reviewing 614 executions in that state since the introduction of electrocution in 1891.

One of our greatest jurists, the Honorable Learned Hand, in 1923 made a statement as follows:

> "No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the armchair formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime." [1]

Richard H. Kuh, Co-Ordinator of the New York State Combined Council of Law Enforcement Officials, stated the following in the NDAA Journal of the National District Attorneys Association for July-August 1965:

> "That argument is specious on both grounds: private citizens *do*—under limited circumstances—have the right to take life; and whether or not they do, society is authorized to do many things not permitted to the citizenry. Specifically, G. I.'s fighting in Viet Nam, are not only *permitted* to kill, but are *ordered* to kill. Apart from war, a police officer pursuing an escaping felon may take life. A private citizen, who is attacked and whose life is in danger, may—meeting force with force—take the life of his assailant. These are circumstances, that exist today, in which private citizens have both the moral and the legal right to kill.

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[1] *United States v. Garssen*, 291 Fed. 646 (S. D. N. Y. 1923).

There are circumstances, too, in which the community has greater authority than has any private citizen in terms of depriving wrong doers of sacred rights. The Declaration of Independence tells us, for instance, that all men are endowed "with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The private citizen cannot deprive another of these rights; yet the community, daily, in the criminal courts, deprives persons of "Liberty," and of "the pursuit of Happiness." By the same token, the community has, traditionally, been permitted, in capital cases, to deprive its citizens of "Life."

First and foremost, does the death penalty deter prospective killers? Deterrence cannot, it is conceded, be statistically proven. There are no significant figures to be considered. Homicides happen to one or two or three persons per hundred thousand in population (one, or two, or three one thousandths of one percent). When cut that fine, the figures are so tiny as to have little statistical meaning when one is dealing with the varied motivations of human beings. But there are other non-statistical bases for analyzing deterrence.

First, as to common sense:

If slight punishment deters, greater punishment is a greater deterrence, and the ultimate punishment should be the ultimate in deterrence. Not to everyone of course: there are some people, some prospective killers, whom nothing can deter. If any prospective murderers can be deterred, however, to that extent innocent persons may be saved. The question is: if we retain capital punishment, will one or more innocent persons who might otherwise be killed, be spared?

The greatest single fear that is common to all mankind is the fear of death. One of the foundation

stones of religion or at least the religious activity of many people, is the fear of death, of the uncertainty of what is to come after life has been terminated. When we talk of the drives for shelter and for the satisfaction of hunger, we are talking of particular aspects of the more basic drive for self-preservation. In light of the enormity of the fear of death, and of the resultant drive for self preservation, it counters good common sense to maintain that these drives are inadequate to deter *some* potential killers from taking life.

Second, as to experience:

We know that after the Lindbergh Law was passed, making kidnapping punishable by death, the incidence of kidnapping dropped markedly in this country.

Prosecutors, with some frequency in New York, find robbery cases in which the crimes were committed with unloaded guns. Why? The New York State Legislature has not made it illegal to sell ammunition to persons without gun permits, nor is it unlawful to possess such ammunition. Yet it is unlawful to carry, unlicensed, a concealable weapon. Why then do felons commit robberies with unloaded guns when ammunition is easily secured, lawfully, but the gun can only be purchased clandestinely, in a criminal transaction? An armed robber, convicted as a first offender in New York State, faces a mandatory minimum of ten years imprisonment, and a maximum of thirty years. If he is a second offender, the maximum is sixty years. Eluding capture, then, is important, and a loaded gun is likely to aid escape far more effectively than is an unloaded one—a dummy weapon. One *must* conclude (and robbers, when questioned, have confirmed this) that when empty weapons are carried it is because the perpetrators recognize that in the excitement, in the alarm, in the unforeseen incidents that may accompany any felony, the stick-up men don't want to find they have killed someone,

and *hence face the electric chair*. Eternity is far more foreboding than is thirty or sixty years.

The abolitionists have drama on their side. In New York State, for instance, twenty-one men are in the death house in Sing Sing. All have names, ascertainable background, a variety of known personalities; some have wives and children. These known lives are being weighed against nameless, faceless, unknown, unidentifiable, uncountable shopkeepers, against unspecified people walking the street—or riding subways—at night, and in the daytime. Identities give the first group dramatic and emotional appeal. The second group, amorphous and vague, is lacking in such dramatic impact. One basic consideration should shift the balance, however. The faceless and uncountable ones are all *innocent*; the twenty-one known killers have all been found guilty; before they are executed—any who are to be electrocuted—their convictions will have been affirmed on appeal, and affirmed and reaffirmed under collateral attack.

Most in law enforcement urge, for the present, the wisdom of doing what can be done to protect the innocent, the faceless, the uncounted, even though it means taking the lives of the known and identifiable.

One of America's greatest judges, a venerable figure in our judicial history who, as a young man in the Civil War knew intimately the carnage of battle, Oliver Wendell Homes, in 1925 wrote to Harold Laski:

> 'If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your action was inevitable for you, but *to make it more avoidable by others* we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.'

Clearly, this leader of our great liberal tradition believed solidly in the deterrent effect of capital punishment. Has anything since transpired to show him in error?

Apart from deterring potential killers who are at large, the death penalty deters the caged felon from killing to gain his freedom. The life prisoner may be deterred—by visions of the chair—from killing his keeper; the cornered fourth offender, being taken into custody, may be deterred from killing his policeman captor.

Moreover, the executed murderer can never kill again. Several years ago, in New York State, Fredrick Wood, a paroled killer, killed twice again within thirty days of gaining his freedom. More recently this was done by a defendant in California who was saved from the gas chamber by a new trial.[1] A person today serving a New York life sentence is eligible for release in less than twenty-seven years, and in other states the average life term is as low as ten years.

There is, of course, no way that society can guarantee that a killer will be kept imprisoned. Although at the time of trial, and at the time of appeal, and at the time of collateral attack, a host of courts have found that a man's conviction was fair, and proper, and just, and that he was given all the procedural safeguards that exist in the law, we know that two days from now—or two, or twenty-two, years from now—new judges may change the law, engrafting upon it new requirements not even dreamed of today, not bearing on innocence or guilt and that such changes may be given retroactive effect.[2] These completely unforeseeable and hence unavoidable switches, quite apart from parole pos-

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[1] *People v. Morse*, 388 P. 2d 33 (Cal. 1964).

[2] See, for instance, *Jackson v. Denno*, 378 U. S. 368 (1964) and *People v. Huntley*, 15 N. Y. 2d 72 (1965).

sibilities, may set loose dangerous and concededly guilty killers, to prey again upon their communities.

A few years ago, when Adolph Eichmann was kidnapped and brought to Israel he represented no danger to the people of Israel. From thousands of miles away he had to be smuggled into a land he had never seen in order to be tried and executed. His execution was not to deter, nor to safeguard, but to avenge—a nation, and indeed a world, sought vengeance.

A shocked nation learned of the assassination of President John F. Kennedy. Following the Warren Commission's report, legislation was introduced in the Congress specifying the death penalty for a presidential assassin. This is hardly to deter; if the cordon of armed secret service men that surrounds a president, ready to shoot any attacker on the spot, does not deter, legislation is not likely to do so. Clearly, the pending federal bill seems designed simply to avenge.

Enlightened thinkers may decry vengeance, but they recognize that it exists. A distinguished psychiatrist, Dr. Smiley Blanton (personally opposed to capital punishment), in a letter to the New York Herald Tribune on April 3, 1960, wrote:

> 'As a psychiatrist my experience teaches me that in the unconscious mind there is so much hate and guilt that people will find a certain satisfaction in having criminals executed by the state.'

We are dealing with human beings, *human* by definition, and retaining these primal drives.

One may join the abolitionists in disowning vengeance, and in wishing we might rise above it. But is not its propriety for the community to judge? Who can say *with certainty* that the community, as represented on the jury (in the majority of states in which the jury alone determines when the death

penalty is to be inflicted), is wrong and has no right to express vengeance when it sends callous multiple killers to the electric chair?

We are living in an era of great chaos and lawlessness. Crime alarms and terrifies more and more people; it seems omnipresent. Some reaffirmation is now badly needed of the strength of the law, of its massive omnipotence, of its awesomeness. Retaining capital punishment constitutes one such reaffirmation.

For the present the death penalty should be retained; it should be available to jurors to invoke—by their unanimous action only—in the case of the multiple murderer (both the person who kills and is sentenced and is then released and kills again, and the person who goes on a murder spree and kills six people within a week). It should be available to deal with the killer for hire—the Murder, Incorporated minion. It should be retained and available for the felon who, to escape what may be a life sentence, kills a prison guard or kills a police officer. It should be available to deal with the mugger and the rapist who, facing sentences so long that they are equivalent to today's life sentences, determine to kill the one witness who may identify them.

The simplest and most logical way of retaining capital punishment so that it can be invoked in the appropriate cases would seem to be through the bifurcated trial. This gives both sides the opportunity, after the question of guilt has been disposed of, to let the jurors know everything relevant about the defendant. They are thus able to intelligently separate out who is to go to the chair and who isn't.

This sifting by the community, rather than a legislative pre-sifting that excludes certain murders from the area of capital crimes, is most logical and is likely to be most satisfactory.

But if our legislatures believe the death penalty should go, this is a question uniquely suited to decision by plebiscite of the electorate, and the lawmakers should submit the question directly to the public.

If the electorate has to make this decision, this will force a "great debate"—a debate that will inform and directly involve the people in this decision. They have a stake in the outcome: their lives are involved, as is their interest—if any—in avenging heinous murder and deterring potential murderers. The question is so unique, so grave, so fraught with public emotion, that it would not be an improper declination of legislative responsibility to submit it to the voters.

Ten states have abolished capital punishment, and—within a few years—restored it. Several have again abolished it. The decision of whether or not to take a life is one a state should not make because of a whim or of a Whitmore. It is a decision that, once made, should not be recanted because of an egregious murder. Making the change pursuant to a plebiscite would minimize the chance of vacillation. (Clearly there could be no objection to a moratorium on electrocutions while this fundamental decision was being made by the electorate.)

Whether or not the electorate, after casting its ballots, favors the retention of the death penalty, we should be assured by this state-wide plebiscite that Mr. Justice Holmes' 'first requirement of a sound body of law * * * that it should correspond with the actual feelings and demands of the community,' will have been met."

II.

The standards set by the M'Naghten Test of Criminal Responsibility do not violate the Fourteenth Amendment.

In the trial there was a factual determination of the Petitioner's mental condition by two (2) eminent psychiatrists, who testified that the Petitioner knows the difference between right and wrong. (R. 706, 707, 894 and 895.)

In addition to the above testimony the Petitioner introduced the United States Army records which only the Petitioner could procure, which substantiated that he knew right from wrong during his service in the United States Army.

In accordance with Ohio Revised Code Section 2945.39 governing pleas of insanity as a defense, the Petitioner was sent to the Lima State Hospital for examination, observation and evaluation. The Petitioner was found to be legally sane and knew right from wrong.

In determining whether a person was legally insane at the time of the criminal act, the concept of mental disease has been an important factor since the *M'Naghten* rules[1] were formulated in England by the House of Lords over a century ago.

Today our courts give great credence to two (2) modern insanity tests; the *Durham*[2] and the Model Penal

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[1] "To establish a defense on the grounds of insanity, it must be clearly proved that, at the time of the committing the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case,* 10 CL. & F. 200, 210, 8 Eng. Rep. 718, 722 (H. L. 1943).

[2] *Durham v. United States,* 214 F. 2d 862, 875 (D. C. Cir. 1954).

Code,[1] that require that the criminal act be "the product of" or "result of" mental disease or defect, thus placing even greater emphasis on mental disease than those of *M'Naghten.*

These points are cited only to provide a logical perspective so that the importance of the term "mental disease" and its relation to criminal law may be observed.

An examination of all the evidence and testimony in this case reveals that the Petitioner unquestionably was sane, knew right from wrong and therefore, the essential holdings set out in *Durham v. United States,* 214 F. 2d 862, cannot govern this case unless there is shown: 1, That the trial court did not correctly apply existing rules governing the burden of proof on the defense of insanity, and, 2, that existing tests of criminal responsibility are obsolete and should be superseded.

In *Carter v. United States,*[2] the Appellant's conviction for First Degree Murder discussed the insanity test only for the purpose of guidance in the second trial. The Court stated:

> "Mental "disease" means mental disease. Mental illnesses are of many sorts and have many characteristics. They, like physical illnesses, are the subject matter of medical science. The problems of the law in these cases are whether a person who has committed

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[1] Model Penal Code (Proposed Final Draft No. 1, 1961). Section 4.01 Mental Disease or Defect Excluding Responsibility.

(1) A person is not responsible for criminal conduct if at the time such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

[2] *Carter v. United States,* 252 F. 2d 608, 617.

> a specific criminal act—murder—assault—arson or what-not—was suffering from a mental disease, that is from a medically recognized illness of the mind."

A careful search of psychiatric literature reveals that there are no recognized authorities or generally accepted medical definitions of mental disease.

The petitioner raises the issue of being classified as a "constitutional psychopath" and nowhere do we find an accepted legal definition of that term nor its application to any cited cases.

The only conclusion of the Petitioner is that the rule is the product of an age of ignorance and superstition, which has grown older but wiser with use and passage of time. We cannot under any stretch of the imagination accept this conclusion as a violation of a constitutional right.

The question of mental disease can be formulated with the authority of law, on legal grounds, in the language of law with a genuine respect for criminal law.

Therefore, the standards set up by this Court which are consistently followed must continue to be the accepted standards and consequently are not a denial of due process of law guaranteed by the Fourteenth Amendment.

III.

Blood-stained clothing taken from petitioner's home were not in violation of the Fourth, Fifth and Fourteenth Amendments.

Respondent urges this Court to deny his petition for a Writ of Certiorari as prayed for in his petition.

Every criminal investigation starts as soon as there is reason to believe a crime has been committed and is subject to prosecution. Investigation may be and in many instances is started by law enforcement officers and/or the County prosecutor. Each has taken an oath to protect the

laws and prosecute all offenders. It further requires co-operation between both agencies to best protect the law abiding citizens.

There is no dispute about the facts that the Petitioner was a possible suspect and there was probable cause for the following reasons:

1. The suspect was a former tenant who possessed a violent temper, who destroyed much property when he vacated the premises where the body of Margaret Van Arsdale was discovered by a neighbor on the morning of July 13, 1963.

2. Petitioner was a known criminal to the investigating authorities.

3. Petitioner had fled from the State of Ohio for the reason that he knew that there was a warrant for his arrest for Assault and Battery.

4. Petitioner had a criminal record and known to be a Peeping Tom and, as the record reveals, had been arrested and convicted for molesting a young girl.

The Fourth Amendment to the Constitution of the United States reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The provisions of the Fourth Amendment are enforceable against the states through the Due Process Clause of the Fourteenth Amendment and all evidence obtained by search and seizures in violation thereof is inadmissible in a state court.[1]

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[1] *Mapp v. Ohio*, 367 U. S. 643, *Kerr v. California*, 374 U. S. 23.

However, if evidence in question is not obtained by search and seizure but is voluntarily handed to the police officers, these Constitutional guarantees are not involved.[1]

"Search" ordinarily implies a quest by an officer of the law or a prying into hidden places for that which is concealed.

"Seizure" contemplates forcible dispossession of the owner.

Guns and clothing voluntarily shown to and given police by Defendant's wife, without coercion and taken away with her consent were not obtained in violation of Constitution of State or United States, were not subject to being returned to Defendant and were admissible in evidence if found relevant and material at trial. U. S. C. A. Const. Amends. 4 & 14.[2]

The arresting officers did have probable cause as clearly stated in *Beck v. State of Ohio*.[3]

> "Rule of probable cause for arrest is a practical, nontechnical conception affording best compromise that has been found for accommodating often opposing interests, and to require more would unduly hamper law enforcement and to allow less would be to leave law-abiding citizens at mercy of officers' whim or caprice."

Court further stated:

> "When constitutional validity of arrest is challenged, it is function of court to determine whether the facts available to officers at moment of arrest would warrant man of reasonable caution in believing that an offense has been committed."

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[1] *State v. Nelson*, 105 N. H. 184, 191, 196; *United States, ex rel. Stacey v. Pate*, 324 F. 2d 934, 935.

[2] *State v. Coolidge Jr.*, 1965, 208 A. T. 2d 322.

[3] *Beck v. Ohio*, 379 U. S. 89, 90 and 91; 85 S. Ct. 223.

"There are limits to the permissible scope of a warrantless search incident to a lawful arrest, but we proceed on the premise that if the arrest itself was lawful, those limits were not exceeded here. See *Harris v. United States,* 331 U. S. 145, 67 S. Ct. 1098; *United States v. Robinowitz,* 339 U. S. 56, 70 S. Ct. 430; cf *Preston v. United States,* 376 U. S. 364, 84 S. Ct. 881. The constitutional validity of the petitioner's arrest. Whether the arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. *Brinegar v. United States,* 338 U. S. 160, 175-176 (93 L. Ed. 1879, 1890, 69 S. Ct. 1302); *Henry v. United States,* 361 U. S. 98, 102 (4 L. Ed. 2d 134, 138, 80 S. Ct. 168). 'The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating * * * often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.' *Brinegar v. United States, supra* (338 U. S. at 176, 93 L. Ed., at 1891)."

"In the *Beck case,* the United States Supreme Court set itself up as a fact finding body and reversed the Ohio Supreme Court on the theory that the evidence of probable cause in that case was insufficient to justify the petitioner's arrest without a warrant."

However, in a more recent Ohio case, *State v. Young,*[1] the question of probable cause was more convincing than in the evidence presented in the *Beck* case.

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[1] *State v. Young,* 8 Ohio App. 2d 51 (1966).

It held as is applicable in this case that the arrest of the Defendant was not based on mere suspicion, nor was it the product of any rash judgment or indiscretion and according to the evidence and the only reasonable inferences which might be drawn therefrom, the arrest was the result of the careful planning and diligence of experienced police officers whose combined knowledge was amply sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense.

This is all the law requires and to require anything more certainly would unduly hamper law enforcement.

Furthermore, the petitioner testified on his own behalf and admitted he was on the premises and tied the decedent in a blanket with an undergarment and pair of panties before he left.

In the *Beck* case, the court further stated on page 92:

"In turning to the question of whether or not the record in the case before us can support a finding of probable cause for the petitioner's arrest, it may be well to repeat what was said by Mr. Justice Clark, speaking for eight members of the Court, in Ker v. California:

'While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—i.e., constitutional—criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those

rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques.' 374 U. S. 23, at 34, 83 S. Ct. 1623, at 1630."

IV.

Petitioner's argument that oral confessions obtained while in custody were admitted into evidence in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments are unfounded.

The Petitioner, as shown by the record, had been involved with the law since he was fourteen years old. He admitted to the authorities, the psychiatrists that he got into trouble while serving in the United State Army; that after being discharged from the Army under Section 208, he continued to break the law. He and his wife testified that he left the State of Ohio because there was a Warrant for his arrest for Assault and Battery.

There had been a robbery at a service station and the arresting officers did not tell this Petitioner deceitfully that he was a suspect in a fictitious gasoline station robbery. A careful examination fails to support the Petitioner's statement on page 48 of the petition herein.

The record and facts fail to further support his further statement that during this entire period of detention, Petitioner was held incommunicado, questioned at length by interrogating officers operating in relays for as long as five (5) hours at a time.

Respondent challenges this false and unsupported statement which also appears on page 48 of his petition.

He was advised of his rights and the Ohio Supreme Court so stated[1] in syllabus No. 1, which is as follows:

> "Where, during the investigation of a crime, a person not yet charged with the commission of such crime is informed prior to being interrogated by a deputy sheriff and an assistant prosecutor that he is not required to make any statement, and that any statement which he might make may be used against him, and where he has not requested that counsel be provided, such person has not been denied the assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution."

The Petitioner was the only suspect and was not pressured by any techniques.

There is no law that prevents a criminal to re-enact a crime. The record shows that he voluntarily agreed to take the police officers and show them the exact route he followed in his car and by foot. He demonstrated the exact location of his car which he drove about one-fourth of a mile off the highway into a plowed field and pointed the route he took to the decedent's home.

The Petitioner admits he made a full confession in the afternoon of July 15, 1963.

That evening the Petitioner was brought into court at which time an affidavit was prepared, filed and brought before the Elyria Municipal Court and he was charged with Murder in the First Degree.

The court continued the arraignment to the following morning to allow Petitioner to consult with counsel, who, the next morning waived preliminary hearing and the

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[1] *State v. Woodards,* 6 Ohio St. 2d 14 (1966).

Petitioner was bound over to the next session of the Grand Jury as provided for under Ohio Revised Code.

Thereafter, Petitioner selected two other counsel to represent him at the trial before the Court of Appeals and the Ohio Supreme Court and is now represented by three other able counselors before the United States Supreme Court.

This Respondent agrees with the Petitioner that the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort,[1] and can be made only by an examination of all the attendant circumstances.

In the instant case, we have a twenty-five year old married man, who has been involved with the law on many occasions, been represented by counsel, served in the United States Army and with an I.Q. of 85 and 91.

Petitioner's averment that he was held incommunicado is not substantiated by the record.

His contention that since his confession was obtained by in custody interrogation during a period of detention resulting from failure of the arresting officers to bring him before a magistrate without necessary delay, such illegal detention taints the confession to such an extent that it must be suppressed. This man was not charged with First Degree Murder until 6:00 p.m. on July 15, 1966, the very same day that he admitted the crime and re-enacted the scene of the crime. This was less than four hours after his admission.

There was no delay in arraignment. The petitioner was not charged with Murder until after the facts admitted were checked and verified by the law enforcement officers and the County Prosecutor's Office.

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[1] *Wilson v. United States*, 162 U. S. 613, 623.

Therefore, there is no basis for Petitioner's argument that McNabb-Mallory rule should apply and also there is absolutely no supported evidence of any valuation of the due process clause of the Fourteenth Amendment.

V.

Petitioner has waived his Federal constitutional rights by his own conduct.

He took the stand in his own defense, had ample opportunity to rebut any and all evidence introduced. He was confronted with all the State's witnesses; therefore, how can the Petitioner in good conscience state on page 63 of his petition, "The after-the-fact justification of a tainted trial by the Ohio Supreme Court will not bear close analysis."

CONCLUSION.

We agree with Petitioner that this was a brutal and senseless death.

There is no cry for vengeance of a frightened community.

The Petitioner's exaggerations about the home being ransacked are conclusions of someone's imagination, who had absolutely no facts to warrant such false statements.

There was no coerced confession, no illegally obtained evidence.

The Petitioner brought in as his own witness a prominent psychiatrist to testify that he was sane, that he knew right from wrong.

The laws of the State of Ohio and the laws of the United States were established for the protection of society, binding upon all persons and the guilty should be punished accordingly.

For all the reasons given throughout this reply, the Petitioner should be denied a writ of certiorari.

Respectfully submitted,

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